Supreme Court, U.S.
FILED

(1)

No. 03 - 79 MAY 9 - 2003

IN THE

Supreme Court of the United States

MANUEL GONZALEZ-GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JUDITH H. MIZNER
Counsel of Record
79 State Street
Newburyport, Massachusetts 01950
(978) 462-0505

Dated: May 9, 2003

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

50 pp

QUESTION PRESENTED

Does the denial of a certificate of appealability under 28 U.S.C. § 2253(c) by the court of appeals contravene this Court's decision in *Miller-El* v. *Cockrell*, 537 U.S. ___, 123 S.Ct. 1029 (2003), where the court reached its decision after addressing the merits of the issues sought to be raised on appeal and concluding that the petitioner would not prevail, and without evaluating the criteria set out in this Court's decisions concerning the proper standard of review to be applied?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURSIDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS WHY THE WRIT SHOULD BE GRANTED 7

CONCLUSION 11

TABLE OF AUTHORITIES

CASES:

Faretta v. California,
422 U.S. 806 (1974) 10

Miller-El v. Cockrell,
537 U.S. ___, 123 S.Ct. 1029 (2003)
..... i, 7, 8, 9, 10

Miller-El v. Johnson,
261 F.3d 445 (5th Cir. 2001) 7

Slack v. McDaniel,
529 U.S. 473 (2000) 5, 7

United States v. Cronic,
466 U.S. 648 (1984) 11

United States v. Gonzalez-Gonzalez,
136 F.3d 6 (1st Cir. 1998) 3

United States v. Gonzalez-Gonzalez,
106 F.Supp.2d 269 (D.P.R. 2000) 3

United States v. Gonzalez-Gonzalez,
258 F.3d 16 (2001) 3

United States v. Torres,
793 F.2d 436 (1st Cir. 1986) 6, 10

CONSTITUTIONAL PROVISIONS AND CODES:

United States Constitution

Amendment VI 2

United States Code

28 U.S.C. § 1254(1) 1
28 U.S.C. § 2253 4
28 U.S.C. § 2253(c) ..... i, 2, 9
28 U.S.C. § 2255 ..... 1, 3, 9

PETITION FOR A WRIT OF CERTIORARI

Petitioner Manuel Gonzalez Gonzalez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the First Circuit denying petitioner's application for the issuance of a certificate of appealability appears in the appendix hereto, App. 4a.[1] The unreported opinions of the United States District Court for the District of Puerto Rico denying petitioner's application for a certificate of appealability and denying petitioner's motion for postconviction relief pursuant to 28 U.S.C. § 2255 appear in the appendix at App. 13a and 19a respectively.

JURISDICTION

The judgment of the Court of Appeals in this case was entered on October 29, 2002 (App. 12a). A motion for reconsideration was denied on December 10, 2002 (App. 3a). A supplemental motion for reconsideration and suggestion for rehearing en banc was denied on February 10, 2003 (App. 1a). This petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

---

[1] "App.#a" refers to petitioner's Record Appendix.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2253(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —

. . . . .

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Petitioner, Manuel Gonzalez-Gonzalez is serving six concurrent sentences of life imprisonment.[2] He was convicted of participating in a conspiracy involving the importation and distribution of marijuana and cocaine and substantive offenses

---

[2] He is also serving a concurrent term of 40 years imprisonment and four concurrent terms of 20 years imprisonment.

involving those same drugs. These were petitioner's first convictions.[3]

Petitioner's convictions were affirmed on direct appeal. *See, United States* v. *Gonzalez-Gonzalez*, 136 F.3d 6 (1st Cir. 1998). His motion for a new trial was denied (*see, United States* v. *Gonzalez-Gonzalez*, 106 F.Supp.2d 269 (D.P.R. 2000); that denial was affirmed on appeal. Notwithstanding the recantation of testimony by two witnesses characterized by the government as key to the government's case, the government's withholding of exculpatory evidence and the prosecutor's "at the least . . . careless" provision of misinformation to the court, the Court of Appeals found that a new trial was not required. *See, United States* v. *Gonzalez-Gonzalez*, 258 F.3d 16, 25 (2001).

Petitioner filed a motion for post-conviction relief pursuant to 28 U.S.C. § 2255. That motion raised, *inter alia*, the questions of whether petitioner had received ineffective assistance of counsel where appellate counsel failed to raise the following issues on direct appeal: 1) whether the district court had erred in denying defendant's repeated requests to proceed *pro se* at trial; and, 2) whether the district court had erred in responding to notes from the jury during deliberations without advising either the defendant or defense counsel of either the jurors' questions or the court's responses.

On January 25, 2002 the district court denied the motion (*see*, unreported decision at App. 19a). The court rejected petitioner's claim concerning *pro*

---

[3] The offenses did not involve physical injury to others. The case against Gonzalez hinged on the testimony of persons cooperating with the government to obtain concessions in their own cases — two of whom, described by the government as key witnesses, recanted their testimony after petitioner's trial. No physical evidence provided substantial corroboration of petitioner's involvement.

se representation by construing one of petitioner's pre-trial requests as a request for hybrid representation rather than a clear request to proceed *pro se* and by ignoring petitioner's later requests, made both prior to trial and on the first and second days of trial, which reiterated his desire to proceed *pro se*. In so ruling, the district court also ignored its own rulings, made on the first and second days of trial, which clearly recognized that petitioner had requested to proceed *pro se*.[4] On the first day, after questioning petitioner's legal training and seeking the opinion of counsel for then codefendants in addressing the issue again, the court stated: "What I am saying is that you cannot proceed pro se. . . . What I am denying is your right to represent yourself." (App. 28a). At the end of a colloquy at the outset of the second day of trial, the court reiterated: ". . . I am denying your request to proceed pro se." (App. 30a).

The district court did not expressly address the challenge to the treatment of notes from the jury during deliberations. The record reflected that the court had responded to notes sent from the jury during its deliberations without discussing the responses with either defendant or defense counsel. The responses included providing the jury with transcripts and an additional instruction.

Pursuant to 28 U.S.C. § 2253 petitioner sought a certificate of appealability (hereinafter "COA") from the district court on issues including, *inter alia*, ineffective assistance of appellate counsel in failing to raise on direct appeal the denial of his requests to proceed *pro se* and the trial court's responding to

---

[4] Excerpts from the first and second days of trial appear at App. 26a *et seq.*

the notes/questions from the jury during deliberations without prior consultation with either defendant or his trial counsel. The district court denied the COA in an unreported Opinion and Order (App.13a), stating, in essence, that since the court had denied the petition, it had "already implicitly determined that Petitioner has not made a 'substantial showing' of 'the denial of a constitutional right.". (App. 14a-15a).

Petitioner then sought a COA from the United States Court of Appeals for the First Circuit. Petitioner challenged the standard utilized by the district court in denying the COA — a standard which essentially concluded that no appeal was warranted because the district court had denied the motion for post-conviction relief. He maintained that he had made a substantial showing of the denial of a constitutional right under the standard set forth by this Court in *Slack* v. *McDaniel*, 529 U.S. 473 (2000); that he had shown that the issues raised in his motion for post-conviction relief were reasonably debatable and could be resolved in a different manner by reasonable jurists and/or deserved further exploration. Based on record facts and relevant case law, he maintained that applying the appropriate standard of review, a COA should issue.

The Court of Appeals denied the COA. The court did not discuss the appropriate standard to be employed in determining whether a COA should issue or the factors to be considered. Rather, it concluded that the district court had "correctly denied the petitioner's request for self-representation because the petitioner did not unequivocally waive his right to counsel." Thus, the Court of Appeals essentially ruled on the merits of

the issue and then denied the COA based on its conclusion as to the merits. It also reached its conclusion while noting that petitioner had "submitted a pro se motion stating that he 'remains in the position of requesting from the Court his pro se representation with the assistance of his attorney . . . as standby counsel.'" (App. 5a (emphasis in opinion)). This was one of the pretrial requests which petitioner maintained demonstrated an unequivocal waiver of his right to counsel, particularly in light of prior decisions from the Court of Appeals for the First Circuit noting approvingly and supporting the appointment of standby counsel and referring to *pro se* representation with standby counsel as "a 'hybrid arrangement'" *See, e.g., United States* v. *Torres*, 793 F.2d 436, 441 (1st Cir. 1986)).[5]

In rejecting a COA on the issue of the propriety of the district court's treatment of notes from the jury, the Court of Appeals again did not address the standard of review to be employed. After stating: "We are somewhat more troubled by the claim that trial error occurred during jury deliberations" (App. 6a) by virtue of the manner in which the trial court addressed notes from the jury, the court again addressed the merits of the contention without full briefing and based its denial of the COA on its determination that no reversible error had occurred because a showing of prejudice was required and petitioner had failed to identify a "plausible way in which he might have been prejudiced." (App. 7a).

---

[5] In reaching its decision the Court of Appeals also failed to note or evaluate the relevance of the district court's rulings on the first and second days of trial that essentially recognized petitioner's clear communication of his desire to proceed *pro se*.

The Court of Appeals followed the same procedure with respect to other issues raised and denied a COA.

Motions for rehearing and for rehearing en banc were denied without further opinion (App. 3a, 1a).

REASONS WHY THE WRIT SHOULD BE GRANTED

This Court should grant this Petition for Writ of Certiorari because the decision below denying a COA conflicts with this Court's recent decision in *Miller-El* v. *Cockrell*, 537 U.S. ___, 123 S.Ct. 1029 (2003) and with the standards of *Slack* v. *McDaniel*, 529 U.S. 473 (2000) reaffirmed in *Miller-El*, *supra*. The issuance of a COA is required under the appropriate standard of review.

The defendant in *Miller-El*, *supra*, sought habeas corpus relief claiming, *inter alia*, that jury selection procedures violated the Equal Protection Clause and decisions of this Court. The petition and a COA were denied by the district court. The court of appeals also denied a COA. After citing this Court's decision in *Slack* v. *McDaniel*, *supra* for the standards governing the issuance of a COA (*see*, *Miller-El* v. *Johnson*, 261 F.3d 445, 449 (5th Cir. 2001)), and recognizing the presumption of correctness given to a state court's determination of a factual issue as a relevant factor (*id.*), the court of appeals addressed the merits of the issues raised by defendant, conducted an independent review of the state court findings and evidence presented by the defendant and concluded that habeas corpus relief was not warranted (*id.*, 449-452; *see also*, *Miller-El* v. *Cockrell*, *supra*, 123 S.Ct. at 1036). Accordingly, the court denied the requested COA.

Petitioner sought certiorari and this Court reversed the court of appeals' denial of the COA, holding that a certificate should have issued and reiterating the appropriate standard of review:

> . . . when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. (citation omitted). . . . A petitioner satisfies th[e] standard [for a COA] by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.

This Court further explained the limited nature of the inquiry:

> . . . This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Miller-El v. *Cockrell, supra,* 123 S.Ct. at 1039.

As this Court further stated, a finding that petitioner will prevail on the merits is not required:

> We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Id., at 1040.

Conducting its own threshold examination in that case, this Court concluded that the issue was debatable and that a COA should have issued.

The same standards apply to review of an application for a COA in connection with a petition for post-conviction relief pursuant to 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c). Applying those standards here, demonstrates the error below.

In this case, the Court of Appeals engaged in precisely the process this Court rejected as flawed in *Miller-El v. Cockrell, supra.* Rather than evaluating the issues raised to determine whether petitioner's contentions that he had been denied a constitutional right involved issues "debatable among jurists of reason" or were issues worthy of further discussion, the court below decided the merits of the issues and denied a COA because it had concluded that petitioner would not prevail on the merits. Had the court employed the appropriate standard of review, a COA should have issued.

The First Circuit based its denial of a COA as to the self-representation issue on its conclusion that the district court had properly denied relief on the merits because petitioner had not adequately requested to proceed *pro se* (App. 5a). While the term "hybrid representation" was used initially, it is clear from the context of the entire record, that what petitioner sought was to exercise his rights under *Faretta* v. *California*, 422 U.S. 806 (1974) and its progeny to proceed *pro se* with standby counsel — an arrangement approved by this Court and others, including the First Circuit. See, *United States* v. *Torres*, 793 F.2d 436, 440 (1st Cir. 1986)(referring to self-representation with standby counsel as a "hybrid arrangement"). Indeed, the First Circuit noted that prior to trial petitioner had filed a motion stating he "remains in his position of requesting from the Court his pro se representation with the assistance of . . . standby counsel" (App. 5a). At the conclusion of the final colloquy on this issue, petitioner stated: "I want it on the record that I do waive my attorney . . ." (App. 29a).

Under these circumstances, petitioner submits that the threshold inquiry appropriate under *Miller-El* v. *Cockrell*, *supra* demands the issuance of a COA.

Insofar as the jury notes are concerned, petitioner suggests that the court's description of itself as "somewhat more troubled" by the district court's actions during deliberations with jury notes (App. 6a) in and of itself suggests that a COA should have issued under the appropriate standard of review. Moreover, the conclusion that a showing of prejudice is required and that none was suggested (App. 7a) — in a situation where the trial court failed to even inform the defense of the

existence of substantive jury questions before providing responses — appears to conflict with this Court's decision in *United States* v. *Cronic*, 466 U.S. 648 (1984) holding that the denial of the presence of counsel at a critical stage is prejudicial per se. Again, a COA is required under the appropriate threshold inquiry.

Accordingly, petitioner submits that the mode of analysis employed by the court of appeals in this case conflicts with that required by this Court's decision in *Miller-El* v. *Cockrell*, *supra*. He further suggests that the path taken by the court below is fraught with potential pitfalls since a memorandum in support of the issuance of a COA is not a full briefing on the merits. If a claim is debatable, it should be decided on the merits only after the opposing contentions are fully briefed by both parties so that the debate can be properly resolved.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

JUDITH H. MIZNER
Counsel of Record
79 State Street
Newburyport, Massachusetts 01950
(978) 462-0505

Dated: May 9, 2003

APPENDIX TABLE OF CONTENTS

APPENDIX A

Order of Court of the United States Court of Appeals for the First Circuit, dated February 10, 2003 ..... 1a

APPENDIX B

Order of Court of the United States Court of Appeals for the First Circuit, dated December 2, 2002 ..... 3a

APPENDIX C

Opinion of the United States Court of Appeals for the First Circuit, dated October 29, 2002 ..... 4a

APPENDIX D

Judgment of the United States Court of Appeals for the First Circuit, dated October 29, 2002 ..... 12a

APPENDIX E

Opinion and Order of the United States District Court for the District of Puerto Rico, dated March 18, 2002 ..... 13a

APPENDIX F

Opinion and Order of the United States District Court for the District of Puerto Rico, dated January 25, 2002 ..... 19a

APPENDIX G

Judgment of the United States District Court for the District of Puerto Rico, dated January 25, 2002 ..... 25a

APPENDIX H

(Excerpt of Trial) First and Second Day of Trial 26a

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 02-1243

MANUEL GONZALEZ-GONZALEZ,
Petitioner, Appellant,

v.

UNITED STATES
Respondent, Appellee.

Before
Boudin, Chief Judge,
Torruella, Selya Lynch, Lipez and Howard,
Circuit Judges.

ORDER OF COURT

Entered: February 10, 2003

The supplemental motion for rehearing having been denied by the panel of judges who decided the case and the suggestion for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the supplemental motion for rehearing with suggestion for rehearing en banc be denied.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk.

[CC: Ms. Mizner, Ms. Watkins, Ms. Briceno, Mr. Castro-Lang]

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 02-1243

MANUEL GONZALEZ-GONZALEZ,
Petitioner, Putative Appellant,

v.

UNITED STATES
Respondent, Putative Appellee.

Before
Boudin, Chief Judge,
Selya and Lipez, Circuit Judges.

ORDER OF COURT

Entered: December 2, 2002

The Motion for Reconsideration of Denial of Motion for Issuance of Certificate of Appealability is denied.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk.

APPENDIX C

[NOT FOR PUBLICATION – NOT TO BE CITED AS PRECEDENT]

United States Court of Appeals
For the First Circuit

No. 02-1243

MANUEL GONZALEZ-CONZALEZ,
Petitioner, Putative Appellant,

v.

UNITED STATES,
Respondent, Putative Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Juan M. Pérez-Giménez, U.S. District Judge]

Before
Boudin, Chief Judge,
Selya and Lipez, Circuit Judges.

Judith H. Mizner, on motion for issuance of certificate of appealability, for putative appellant.

October 29, 2002

SELYA, Circuit Judge. The petitioner, Manuel Gonzalez-Gonzalez, moves for a certificate of appealability, 28 U.S.C. § 2253, alleging ineffective assistance of appellate and trial counsel. We recite only the facts necessary to limn the petitioner's claims. We refer readers who hunger for more exegetic detail to our opinion on direct appeal. See United States v. Gonzalez-Gonzalez, 136 F.3d 6 (1st Cir.), cert. denied, 524 U.S. 910 (1998).

The petitioner's principal claim is that his appellate counsel blundered by failing to argue that he (the petitioner) had been deprived of his Sixth Amendment right to represent himself. The record, however, shows that the district court correctly denied the petitioner's request for self-representation because the petitioner did not unequivocally waive his right to counsel. See United States v. Betancourt-Arretuche, 933 F.2d 89, 92 (1st Cir.1991) (honoring "every reasonable presumption against waiver of the right to counsel") (citation and internal quotation marks omitted). With his counseled motion for hybrid representation still pending, the petitioner submitted a pro se motion stating that he "remains in his position of requesting from the Court his pro se representation with the assistance of his attorney ... as standby counsel." (emphasis supplied). The unavoidable conclusion, reinforced by the lengthy colloquy during the second day of trial, is that the petitioner was not asserting his right to represent himself, but, rather, was renewing his request for hybrid representation. Accordingly, appellate counsel was not ineffective for declining to raise the issue of self- representation.

We are somewhat more troubled by the claim that trial error occurred during jury deliberations – error to which trial counsel's lethargy allegedly contributed and about which appellate counsel neglected to complain. We set the stage.

The preferred practice in this circuit is that "messages from a deliberating jury, pertaining to ongoing deliberations, ought to be fully disclosed to the lawyers when received, so that the latter may be heard before the judge implements a course of action." United States v. Parent, 954 F.2d 23, 25 (1st Cir.1992). According to the petitioner's unsworn memorandum,[1] the district court, without notifying either counsel, granted the jury's request for transcripts of the testimony of two government witnesses. The court then issued a written supplemental instruction in response to a jury note without involving counsel in the process. In substance, the instruction reminded the jury that it had a duty to determine the guilt or innocence of the defendant from the evidence in the case, and that the verdict must be unanimous as to each count of the indictment.

In the ordinary course, a habeas application must rest on a foundation of factual allegations presented under oath, either in a verified petition or a supporting affidavit. See, e.g., Rule 2, Rules Governing Section 2255 Proceedings, 28 U.S.C. § 2255. Facts alluded to in an unsworn memorandum are not sufficient. See Barrett v. United States, 965 F.2d 1184, 1195 (1st Cir.1992); Dalli v. United States, 491 F.2d 758, 760 (2d Cir.1974). Here, moreover, even were we to accept the petitioner's unsworn allegations as

---

[1] The sworn petition alleges only that the court "decid[ed] jury notes out of presence of defendant."

true, they would not warrant a certificate of appealability because the petitioner has identified no plausible way in which he might have been prejudiced.

The rule in this circuit is that "a trial court's error in failing seasonably to inform counsel about a jury note does not require reversal if the error is benign." Parent, 954 F.2d at 25 (citing United States v. Maraj, 947 F.2d 520, 526 (1st Cir.1991)); accord United States v. Hernandez, 146 F.3d 30, 35 (1st Cir.1998).[2] This comports with the authorities elsewhere. See, e.g., United States v. Bustamante, 805 F.2d 201, 203 (6th Cir.1986); United States v. Widgery, 778 F.2d 325, 329 (7th Cir.1985); United States v. Arriagada, 451 F.2d 487, 488 (4th Cir.1971); Jones v. United States, 299 F.2d 661, 662 (10th Cir.1962).

In this instance, the supplemental instructions were correct on their face. Moreover, even though the supplemental instructions were "delivered at a critical juncture in the case," they were not "out of balance" in any material respect. Parent, 954 F.2d at 26. In any event, the supplemental instructions were similar to portions of the charge, given earlier, that counsel had reviewed without objections. As for the transcripts, if they were furnished to the jury at all – the court promised them only at the conclusion of its own

---

[2] We have yet to decide whether the appropriate test for harmlessness in this context is that set forth in Chapman v. California, 386 U.S. 18, 24 (1967) (asking whether the error was "harmless beyond a reasonable doubt") or the more lenient inquiry delineated in Kotteakos v. United States, 328 U.S. 750, 776 (1946) (asking whether "the error had substantial and injurious effect or influence" vis-à-vis the judgment). We need not make that choice today, as the petitioner falls short under either definition of harmless error.

review – it is hardly remarkable (and certainly not erroneous) for the court to have key testimony read or submitted to the jury at the jury's request. See, e.g., United States v. Argentine, 814 F.2d 783, 787 (1st Cir.1987). The petitioner gives us no convincing reason to think that counsel might have objected; or that, if he had objected, he could have changed the trial court's mind; or even that, had the transcripts been withheld, the verdict might have been different.

In an effort to parry this thrust, the petitioner contends that, notwithstanding the Parent rule, prejudice should be presumed because he was "denied counsel at a critical stage of his trial." United States v. Cronic, 466 U.S. 648, 659 (1984) (footnote omitted). Doctrinally speaking, however, prejudice per se is hen's-teeth rare. Indeed, two recent Supreme Court cases have emphasized just how unusual are the circumstances that would justify a court in forgoing particularized inquiry into whether counsel's inadequate performance undermined the reliability of a verdict. See Mickens v. Taylor, 122 S.Ct. 1237, 1241 (2002); Bell v. Cone, 122 S.Ct. 1843, 1850-51 (2002). In both instances, the Court reiterated the proposition that, in the ineffective assistance context, prejudice may be presumed only in narrowly circumscribed situations.[3] We too have emphasized the same point. See, e.g., Ouber v.

---

[3] Moreover, the Supreme Court recently vacated the decision in French v. Jones, 282 F.3d 893, 901 (6th Cir.2002) (affirming the grant of a state prisoner's habeas petition on the ground that the state courts "unreasonably applied harmless error analysis to French's deprivation of counsel during the supplemental instruction"). The Court remanded the case "for further consideration in light of Bell v. Cone [.]" Jones v. French, 122 S.Ct. 2324 (2002) (per curiam).

Guarino, 293 F.3d 19, 33 (1st Cir.2002); Scarpa v. DuBois, 38 F.3d 1, 12, 15 (1st Cir.1994). We are constrained by these authorities to hold that the prejudice per se doctrine does not apply in the circumstances of this case.[4]

The petitioner next asserts that his various counsel should have anticipated the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), and that he should be resentenced in light of that decision. Even assuming Apprendi applies retroactively to this case – a matter on which we take no view – any error would be harmless. See United States v. Duarte, 246 F.3d 56, 61-62 (1st Cir.2001) (applying harmless error analysis to assertion of Apprendi error).

Here, the evidence overwhelmingly establishes the minimum drug quantity needed to justify the sentence actually imposed. The government's "very strong case against Gonzalez" included the physical seizure of 350 kilograms of cocaine, part of a "major shipment of cocaine and marijuana Gonzalez had imported from Colombia to Puerto Rico in September of 1992." Gonzalez-Gonzalez, 136 F.3d at 8, 10. No more is exigible to defeat an unpreserved Apprendi claim.

The petitioner also asseverates that his trial counsel should have investigated and called three witnesses on his behalf. This asseveration is

---

[4] Our opinion in Curtis v. Duval, 124 F.3d 1 (1st Cir.1997), is not to the contrary. Dictum aside, the Curtis court, consistent with Bell and Mickens, rejected the habeas petitioner's reliance on "Cronic's prejudice per se principle" and held that the petitioner was not "actually prejudiced." Id. at 6. We explained that the trial court's error in instructing the jury during the "transitory absence" of the petitioner's counsel "was neither substantial nor injurious," but, rather, "harmless." Id.

unpersuasive. There is no indication that one witness, a convicted codefendant in a related case, made available any allegedly exculpatory information before or during the petitioner's trial. The second witness would have offered only cumulative impeachment testimony. The third might in turn have been impeached with his prior statements implicating the petitioner in several drug transactions. Under these circumstances, the petitioner cannot overcome the presumption that counsel's decision not to call these witnesses might be considered sound trial strategy. See, e.g., Lema v. United States, 987 F.2d 48, 55 (1st Cir.1993) (stating that the "decision to interview potential witnesses, like the decision to present their testimony, must be evaluated in light of whatever trial strategy reasonably competent counsel devised in the context of the particular case"); United States ex rel. Walker v. Henderson, 492 F.2d 1311, 1314 (2d Cir.1974) (stating that "the decision to call or bypass particular witnesses is peculiarly a question of trial strategy which courts will practically never second-guess") (citation omitted).

Finally, the petitioner faults his appellate counsel for not bringing the government to account for sharp tactics. In this regard, he contends that the government improperly "highlighted" alleged code words in video transcripts that were shown to the jury, using quotation marks and contrasting typeface for emphasis. At trial, the petitioner objected to the government's playback of tape recordings on several grounds, including improper redaction, manipulation of volume, and apparent errors of transcription. Highlighting was not one of his complaints. We find the new allegation inherently

improbable and contradicted by the record. Thus, we cannot say that appellate counsel was ineffective for failing to raise this claim.

We need go no further. The motion for a certificate of appealability is denied and the appeal is terminated.

So ordered.

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 02-1243

MANUEL GONZALEZ-GONZALEZ,
Petitioner, Putative Appellant,

v.

UNITED STATES
Respondent, Putative Appellee.

JUDGMENT

Entered: October 29, 2002

This cause came on to be submitted on a motion for issuance of a certificate of appealability and the original record on appeal from the United States District Court for the District of Puerto Rico.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The motion for certificate of appealability is denied and the appeal is terminated.

By The Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

MANUEL GONZALEZ-GONZALEZ, Petitioner,	*	
	*	CIV. NO.
v.	*	99-2207(PG)
UNITED STATES OF AMERICA, Respondent.	*	

OPINION AND ORDER

Petitioner, Manuel González-González ("Petitioner"), has filed an "Application for Certificate of Appealability" ("Application for COA") in this Court (Docket No. 35), as required under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). He seeks to appeal this Court's decision denying his Section 2255 Motion. (Docket No. 32). A Petitioner cannot appeal to the circuit court unless a certificate of appealability issues from the district court. See Docket No. 36; 28 U.S.C. § 2253; 1ST CIR. R. 22.1(b).

Having reviewed such application, this Court hereby DENIES the request for a Certificate of Appealability.

Petitioner's Section 2255 Motion sought to vacate his sentence of life imprisonment. (Criminal No. 93-318(PG)). The Motion to Vacate was referred to a Magistrate Judge who prepared a Report and Recommendation ("R&R") (Docket

No. 28). The Magistrate Judge recommended that the petition be denied. Petitioner filed Objections (Docket No. 29) and supplemented it with a pro-se Supplement (Docket No. 31). This Court reviewed and adopted the report in an Opinion and Order dated January 25, 2002 (Docket No. 32).

STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

Under the AEDPA, no appeal may be taken from a district court's ruling on a Section 2255 motion unless a district or circuit judge issues a Certificate of Appealability ("COA") based upon a "substantial showing" by the prisoner of "the denial of a constitutional right." 28 U.S.C. § 2253(c). Moreover, an appealing petitioner must demonstrate that the issues raised supporting his request for a COA are "'debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further."'" Barefoot v. Estelle, 463 U.S. 880, 883 n.4, (1983)(alteration in original)(quoting Gordon v. Willis, 516 F.Supp. 911, 913 (N.D. Ga. 1980) (quoting United States ex. rel. Jones v. Richmond, 245 F.2d 234 (2nd Cir. 1957))). In his Application for COA Petitioner fails to allege any new violations of a constitutional right and does not make a "substantial showing" of such violations. Petitioner does raise constitutional issues in his Section 2255 Motion, but those were examined and decided by this Court upon review and approval of the Magistrate's R&R. Ultimately, in

determining that vacating Petitioner's sentence was not warranted, this Court has already implicitly determined that Petitioner has not made a "substantial showing" of "the denial of a constitutional right."

STANDARD FOR REVIEW OF A DENIAL OF A § 2255 MOTION

An appeal from a denial of a Section 2255 motion permits review only of the refusal to vacate and not the validity of the original judgment and sentence. Semet v. United States, 422 F.2d 1269, 1271 (10th Cir. 1970)(citing Carter v. United States, 168 F.2d 310 (10th Cir. 1948)). In reviewing the denial of a Motion to Vacate, the findings of a district court will not be overturned unless clearly erroneous. United States v. DiCarlo, 575 F.2d 952, 955 (1st Cir. 1978). "It is well established that a party may not unveil and argument in the court of appeals that he did not seasonably raise in the district court." David v. United States, 134 F.3d 470, 474 (1st Cir. 1998).

DISCUSSION

The issues on which Petitioner wants this Court to issue a COA are issues that were previously raised in this district court, in petitioner's appeal of his conviction and in his § 2255 motion to vacate his sentence. The Court shall proceed in turn.

The Petitioner challenges the Court's holding on the 2255 motion because: first, the appellate counsel was ineffective; second, the sentence was imposed in violation of Apprendi v. New Jersey,

530 U.S. 466 (2000); third, the transcripts provided were improperly presented to the jury and lastly, that his trial counsel was ineffective. (Mot. for Certificate at 3-4.) We will address them to determine whether they fall under the Barefoot standard and warrant an issuance of a COA.

The first issue is whether the appellate counsel was ineffective in violation of Petitioner's Sixth Amendment rights. (Mot. for Certificate at 3.) Petitioner has repeatedly made claims that his counsel were ineffective at both the trial and appellate level. (Op. and Order at 2, 5). The claim of ineffective assistance of appellate counsel was reviewed by the First Circuit and was the subject of various motions including a Motion for a new trial. At the Section 2255 stage, Petitioner's argument was summarily dismissed because it was the subject of earlier motions in accordance with Barrett v. United States, 965 F.2d 1184, 1990, fn. 11 (1st Cir. 1992).

The second argument Petitioner makes has to do with his oft-repeated Apprendi claim. (Mot. for Certificate at 4.) In the Opinion and order, the Court held that Apprendi had no applicability to Petitioner's Section 2255 claim because Petitioner was not sentenced beyond the maximum statutory range. (Life imprisonment was the statutory maximum in Petitioner's case). See United States v. Duarte, 264 F.3d 56 (1st Cir. 2001). In addition, Apprendi does not apply retroactively to Petitioner since the Supreme Court has not made this rule retroactive to cases on collateral review. Sustache-Rivera v. United States, 221 F.3d 8, 15, n. 2 (1st Cir. 2000). Given that Petitioner's sentence did not exceed the

statutory maximum and his sentence was imposed before Apprendi, the Court deems that this argument is not susceptible under the Barefoot standard since reasonable jurists could not differ on Petitioner's Apprendi claim.

Third, Petitioner alleges that the prosecution improperly highlighted or selected terminology in a manner that violated Petitioner's constitutional rights. (Mot. for Certificate at 4.) In the Section 2255 Opinion and Order, as well as in the Magistrate Judge's Report and Recommendation and the trial record in 93-318 (PG), it was made abundantly clear that the jury was provided transcripts. An expert was called by the prosecution to provide assistance to the jury in the drug operations that Petitioner was involved in. This issue has already been reviewed by the appellate court and this Court in the Section 2255 motion. This issue yields no more arguments, and this Court finds that no reasonable jurists could debate this point any further.

Last, Petitioner claimed that his counsel was ineffective at the trial level as well. The appellate court and this Court in the Section 2255 motion addressed these issues. Notwithstanding the fact that at both levels, his trial attorney was considered to have acted within the parameters of the Sixth Amendment, Petitioner continues to press this claim. Under Barefoot standard, a substantial showing of constitutional violation must be made. It is this Court's opinion that no reasonable jurors could disagree about this issue. Even in the fact of Petitioner's contention that his trial counsel was ineffective, the Magistrate Judge

praised the attorney's strategy in impeaching one of the prosecution's witnesses. For these reasons, it is the Court's belief that this ground for appeal does not meet the standard set forth in Barefoot.

Petitioner also appeals from the denial of his petition for an evidentiary hearing. It is inherent in the Court's discretion to make findings without an additional hearing. Barrett v. United States, 965 F.2d 1184, 1186 (1st Cir. 1992). Even a facially adequate petition may be denied without a hearing where the alleged facts are conclusively refuted by the record. Moreover, Rule 8(a) of the Rules governing § 2255 proceedings grants discretion to the district court judge in deciding whether or not to conduct an evidentiary hearing. Therefore, this argument is rejected as a ground for obtaining a Certificate of Appealability.

CONCLUSION

None of the arguments presented by Petitioner constitutes substantial showing that his constitutional rights were violated. Upon review of the Motion for Certificate of Appealability, this court finds that the Petitioner does not raise issues that are "debateable among jurists," that are adequate to deserve encouragement to proceed, or that a court could resolve the issues differently. Barefoot, 463 U.S. at 883 n.4.

Therefore, Petitioner's Application for a COA is therefore **DENIED.**

SO ORDERED.

San Juan, Puerto Rico, March 18, 2002.

JUAN M. PEREZ-GIMENEZ
U.S. District Judge

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

MANUEL GONZALEZ-GONZALEZ, Petitioner,	*
	* CIV. NO.
v.	* 99-2207(PG)
	*
UNITED STATES OF AMERICA, Respondent.	* Crim. No. * 93-318 (PG)
	*

OPINION AND ORDER

Before the Court is the United States Magistrate Judge's Report and Recommendation (Docket No. 28) concerning petitioner's motion under 28 U.S.C. § 2255, as well as Petitioner's Appeal of Magistrate's Report and Recommendation (Docket No. 29). In addition, petitioner filed a pro-se Supplement to Appeal of Magistrate's Report and Recommendation (Docket No. 31). The Magistrate Judge recommends that petitioner's section 2255 motion be denied. Because the Court is convinced by the Magistrate Judge's analysis and conclusions, the report and recommendation is approved and adopted and the petitioner's motion is **DENIED.**

BACKGROUND

Petitioner was charged with violations of several statutes including the transportation of

controlled substances and a related conspiracy. Petitioner makes the following claims which the court will examine in turn: ineffective assistance of counsel, both at trial and during the appeals process; an Apprendi violation; the prosecution's use of certain transcripts and recording during the trial; and finally, a violation of his constitutional right to represent himself.

PETITIONER'S CLAIMS

Under 28 U.S.C. §2255, a prisoner may challenge his sentence on four grounds: first, that his sentence was imposed in violation of the Constitution or federal law; second, that the court lacked jurisdiction; third, that the sentence exceeded the maximum authorized by law; and fourth, that the sentence is otherwise subject to collateral attack. Here, the petitioner claims that his sentence was imposed in violation of the Constitution. A petition may be summarily dismissed if it contains bald assertions without a specific factual basis. Barrett v. United States, 965 F.2d 1184, 1186 (1st Cir. 1992).

Petitioner's arguments in the instant motion are all based on constitutional violations.

I. Ineffective Assistance of Counsel:

Petitioner argues that his counsel was ineffective in a manner that was constitutionally deficient. In the landmark case of Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court noted that the "judicial scrutiny of counsel's performance must be highly deferential." Id. at 687. Generally, there is a strong presumption that counsel was effective

and that reasonable choices were made by trial counsel. Id. at 687. Hindsight is not enough to prove a § 2255 ineffective assistance of counsel claim since the "defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (quoting Michael v. Louisiana, 350 U.S. 91, 101 (1955)).

From the record, as illustrated in the Magistrate's Report and Recommendation, the petitioner's allegations as to witness Luz Marina Giraldo's testimony are unfounded. It was not until the fourth day of trial that this defendant entered a plea of guilty and cooperated with the government. It was only then that petitioner had the opportunity to impeach this witness' credibility. In addition, other witnesses testified against the petitioner. The fact that this particular witness was allegedly inadequately impeached does not rise to an ineffective assistance of counsel violation.

II. Apprendi claim:

Petitioner bases his claim on Apprendi v. New Jersey, 530 U.S. 466 (2000). Prior to Apprendi, drug quantity under 21 U.S.C. §§ 841(a)(1) and 846 were sentencing enhancements and not elements of separate aggravated offenses. Petitioner contends that since the quantity of drugs was used in his sentencing as an enhancement and was not considered an element of the offense, the sentence was in violation of Apprendi.

The First Circuit has held that the Apprendi rule does not apply to cases where the defendant was sentenced to more than the statutory

maximum. See United States v. Duarte, 246 F.3d 56 (1st Cir. 2001); accord United States v. Poulack, 236 F.3d 932 (8th Cir. 2000). Petitioner in this matter was sentenced to life imprisonment, the maximum sentence that could have been imposed under the statute. "The rule in Apprendi only applies in situations were the judge-made statutory maximum, and not in situations where the defendant's potential exposure is increased within the statutory range." United States v. Baltas, 236 F.3d 27, 41 (1st Cir. 2001)(quoting United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000)).

III. The Use of Recordings:

Petitioner claims that the use of recordings was improper since there was no specific talk related to drugs on the recordings. The expert presented by the prosecution interpreted the tape for the jury as one with coded language. The language employed would have been unintelligible to the jury had the expert not provided the necessary interpretation. As to the petitioner's claim that the jury was provided with improperly highlighted recordings, it is without merit, as the record shows that the jury was provided with transcripts. (See Docket No. 28).

IV. Petitioner's Sixth Amendment Allegations:

Petitioner alleges that rulings of the trial court violated his Sixth Amendment right to represent himself. See Faretta v. California, 422 U.S. 806 (1974). The record does not show that petitioner chose to ask for the resignation of his counsel, or request the Court that his counsel be removed. In addition, at the Carbone hearing, the defendant made no mention of a request to

proceed pro-se. As aptly pointed out by petitioner's Objections (Docket No. 29), the right is "'unqualified if invoked prior to the start of trial and must be unequivocal" (Docket No. 29, page 9)(quoting United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15-16 (2d. Cir. 1965). Petitioner's pleas were directed at taking an active part in his own defense, not being the sole legal representative responsible for trial strategy. Petitioner indicated he wanted hybrid representation.

On the first day of trial, petitioner again requested that he be involved in his own representation. The Court considered the petitioner's request but indicated that two factors mitigated against granting petitioner's motion: first, his lack of legal expertise, and most importantly, the prejudicial effect this would have on the co-defendants in the case. To be sure, petitioner had complaints about the frequency of his counsel's visits and the attention he had received. This does not constitute a request to proceed pro-se, however. The request was therefore properly denied.

Other issues remain. Petitioner alleges that his appellate attorney was not effective. This claim, however, was the subject of earlier motions and should be summarily dismissed. The Court need not review again those issues raised by petitioner in his appeal to the First Circuit and motions for a new trial. Barrett v. United States, 965 F.2d 1184, 1190, fn.11 (1st Cir. 1992)(quoting Dirring v. United States, 370 F.2d 862, 864 (1st Cir. 1967).

For the reasons stated above, the Magistrate Judge's Report and Recommendation is **APPROVED AND ADOPTED** and the present section 2255 claim is **DENIED.**

SO ORDERED.

San Juan, Puerto Rico, January 25, 2002.

/s/
JUAN M. PEREZ-GIMENEZ
U.S. District Judge

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

MANUEL GONZALEZ-GONZALEZ, Petitioner,	*	
	*	CIV. NO.
v.	*	99-2207(PG)
UNITED STATES OF AMERICA, Respondent.	*	

JUDGMENT

The Court entered an Opinion and Order in this matter denying petitioner's motion.

Wherefore, it is **ORDERED AND ADJUDGED** that this case should be dismissed without prejudice.

IT IS SO ORDERED.

San Juan, Puerto Rico, January 25, 2002.

/s/
JUAN M. PEREZ-GIMENEZ
U.S. District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA	*
vs	* CR. NO. 93-318 (PG)
MANUEL GONZALEZ GONZALEZ, ET AL	*

FIRST DAY OF JURY TRIAL
(EXCERPT OF TRIAL)

The above-captioned cause came on to be heard before the HONORABLE JUAN M. PEREZ GIMENEZ, United States District Judge, sitting in San Juan, Puerto Rico, on January 22, 1996.

[6] Moskowitz. There is no doubt about it. He has a very good legal representation and I do not see the need for that type of arrangement.

THE COURT: Thank you on behalf of your client. Mr. Miranda.

MR. MIRANDA: Yes, Victor Miranda, on behalf of Mr. Azan. Your Honor, my client obviously does not enjoy being placed in this situation, this choice of making a determination as to how one co-defendant ought to be represented. Again, it is

his position that his trial should be apart and again, I don't thin it is incumbent on him to determine how another co-defendant is to be represented. That would be our position for the record.

THE COURT: All right. Now, Mr. Gonzalez, I am skeptical allowing your own representation. I think that Mr. Gray or Mr. Miranda's expressed it both, you are well represented. Your attorney from what I have seen in prior status conferences has met extensively with the attorney for the government. As a matter of fact, this morning he mentioned in chambers the fact that some of the tapes that had been turned over lately that he has started the process of having them enhanced with a possibility towards using some of those tapes in the defense of this case. So I think that in view of the fact that you have no legal training. If you have no legal training you are not **[7]** knowledgeable on the rules of criminal procedure. You would be subjected to the same rules of evidence as any body else, any attorney which you don't know also and the concerns expressed by co-defendants, I believe that my position has to be to preserve the rights, your rights as well as the rights of other co-defendants that Mr. Moskowitz conduct the trial in this case.

My ruling is, that is my ruling at this time. If you feel that the matter should be brought up again, then I will--certainly, I am not closing it completely but I think as things stand now that is the best way to proceed and my ruling stands.

MR. GONZALEZ: Your Honor, you are leaving me with no other chance then I would like to proceed pro se and have my attorney to counsel on me or just to aid me because--

THE COURT: What I am saying is that you cannot proceed pro se. You have Mr. Moskowitz.

MR. GONZALEZ: You are denying my Sixth Amendment right to proceed pro se according to Faretta and the other case.

THE COURT: What I am denying is your right to represent yourself. You have an attorney who is representing you. I find that because of the fact that you are not knowledgeable, you have no background whatsoever, . . .

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA	*	
vs	*	CR. NO. 93-318 (PG)
MANUEL GONZALEZ GONZALEZ, ET AL	*	

SECOND DAY OF JURY TRIAL

The above-captioned cause came on to be heard before the HONORABLE JUAN M. PEREZ GIMENEZ, United States District Judge, sitting in San Juan, Puerto Rico, on January 23, 1996 commencing at 10 A.M.

[11] request to waive your right to an attorney under the Sixth Amendment.

So, I am more clear what is it that you want and I still think that what you want is hybrid representation.

THE DEFENDANT: I want it on the record that I do waive my attorney if I am not allowed to have the, I wanted to proceed pro se--

THE COURT: No, what I am trying to advise you is that if you are going to proceed pro se you have to make a waiver of your attorney; that I am

willing from what you stated to me just now, what you want to do and what his participation is going to be, you are still requesting the Court to allow hybrid representation which I already ruled on. I have also ruled that your request to proceed pro se is untimely under the Betancourt Case because the jury has already been empaneled and sworn. You have had plenty of time to do it, you requested hybrid in December, a month before, a month and a half before trial, it was denied in January 11th and it is not until the jury has been sworn in, empaneled and sworn that you come in with a request for a pro se representation which even then is not unequivocal so I am denying.

Now, that I revisited the issue, I am denying your request to proceed pro se.

THE DEFENDANT: Your Honor, when I find out I put . . .

(2)

Supreme Court, U.S
FILED

No. 03 - 79 MAY 9 - 2003

IN THE

Supreme Court of the United States

MANUEL GONZALEZ-GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL APPENDIX

JUDITH H. MIZNER
Counsel of Record
79 State Street
Newburyport, Massachusetts 01950
(978) 462-0505

Dated: July 9, 2003

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

12 pp

TABLE OF CONTENTS

Report and Recommendation of the United States District Court for the District of Puerto Rico, Castellanos, U.S.M.J. ..... Supp. App. 1-9

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL GONZALEZ GONZALEZ,

Petitioner,

v.

CIVIL ACTION NO. 99-2207 (PG)
CRIMINAL NO. 93-318 (PG)

UNITED STATES OF AMERICA,

Respondent

REPORT AND RECOMMENDATION

Petitioner's motion for post-conviction relief under 28 U.S.C. §2255 was referred to this Magistrate. Upon receipt of the available transcripts and with copy of the Clerk's Office docket sheets, the record has been reconstructed. Several issues raised by counsel as to discovery have already been ruled by this Magistrate through separate orders. No evidentiary hearing is deemed necessary and the matters relevant to resolve this post-conviction petition are discussed below.[1]

The case was originated in 1993 after a federal grand jury charged above petitioner and other individuals with several offenses, including importation of controlled substances, to wit; cocaine and marihuana, as well as a related conspiracy. A direct appeal from his conviction, motions for new trial, and appeal thereof, in addition to appeal from entry of forfeiture are part of the record. All of the

---

[1] A hearing on post-conviction motions is not necessary where a defendant's claim is "conclusively refuted as to the alleged facts by the files and records of the case". United States v. Carbone, 880 F.2d 1500, 1502 (1st Cir. 1989).

above referred have been duly examined and considered by this Magistrate.

Ineffective assistance of counsel:

Petitioner claims that counsel failed to present other witnesses to delve with the allegation that a government's witness had benefited from lenient treatment of close relatives and such strategy amounted to ineffective assistance. Such claim is not substantiated by an examination of the trial record. The affidavits of counsel Aponte and Castillo were received and duly considered. Trial counsel had ample opportunity to cross-examine the government's main witness, including questions before the jury's presence as to motive and possible benefits related to the issue raised in the petition that his mother and brother were not charged or prosecuted.[2] A district court must evaluation counsel's performance from counsel's perspective at the time, in light of the totality of the circumstances. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional competence. Lema v. United States, 987 F.2d 48 (1st Cir. 1993) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)). The decision whether to call a particular witness is almost always strategic. Counsel did not fail to investigate the defense aspect raised in the petition.

The possible impeachment of Luz Marina Giraldo's testimony through her statements prior to the trial, should be contemplated together with the known fact that it was not until the fourth day of trial, as recognized by petitioner's counsel closing arguments, that she decided to enter a plea of guilty and agree to cooperate with the government against co-defendant. Up to that time, she was sitting at the

---

[2] Transcript 2-1-96, pp. 1226-1227, 1231; Tr. 2-2-96, pp. 1251, 1322-1323; Tr. 2-5-96, pp. 1399.

defense table. Not only her own benefit in making a deal thereafter with the government was presented by defense counsel for petitioner, but arguments to impeach her testimony as a scorned lover, were also submitted before the jury.[3] Thus, the jury was made aware of this witness' possible self-interest and could assess her credibility within the required parameters, including her previous denial of petitioner's participation in the offense through letters while they were both in jail, awaiting trial. Petitioner's arguments that counsel failed to submit impeachment evidence as to Luz Marina's testimony insofar as what she had said on prior occasions is belied by the record.[4] In addition, this was not the only co-conspirator who testified against defendant; to wit; Ricardo Rivero and Roberto Garraton-Rivera also testified as to the defendant's drug trafficking activities. Other cooperating witness and an undercover FBI agent additionally testified, together with recorded conversations, surveillance photos, passport entries, travel, and telephone records, as to the charged illegal activities. Petitioner was not facing a judicial proceeding in which the government's burden was less than compelling.

Counsel and defendant were provided with the recording of conversations between the government's informants and the defendants, as well as the transcripts. Regarding the issue that transcripts presented through the pointer system were highlighted and not fully preserved as presented, the jury entertained the taped recordings, not the

---

[3] Transcript 2-14-96, pp. 2425-2426.

[4] This issue was also raised in defendant's appeal where it was determined that there was no reasonable probability that the jury, had it known the true extent and earlier dated of her cooperation with the government, would have reached a different verdict.

transcripts of said conversations, as instructed that transcripts were not evidence.[5]

Apprendi claim:

There was evidence during trial as to the conspiracy and the importation charges related to the amount of the loads of controlled substances.[6] The prosecutor's closing statements summarizes these events and amounts of controlled substances were attributed to the conspiracy through the testimonies of numerous witnesses[7]. The Apprendi[8] issue raised by petitioner in the supplemental motion should also be subject to summary dismissal. In Apprendi, the Supreme Court held that the due process clauses of the Fifth and Fourteenth Amendments make the jury the proper decision maker and the reasonable doubt standard is the proper burden, when a fact raises the maximum lawful punishment. This is only applicable in situations where "the judge-made factual determinations increases the maximum sentence beyond the statutory maximum, and not in situations where the defendant's potential exposure is increased within the statutory range." United States v. Baltas, 236 F.3d 27, 41 (1st Cir. 2001). Finally, defendant was sentenced by the Court within the sentencing

---

[5] Transcript 2-2-96, p. 1181; Id. 1188; Tr. 2-5-96, p. 1523.

[6] A total of 12 bags of marihuana for 58 pounds, and 204 blocks of cocaine, for 478 pounds examined as testified by the expert witness at trial. (Tr. 2-5-96, pp. 1359-1361). Other witness' testimony also made reference to the 625 kilos arranged to be imported into Puerto Rico and part thereof was transported to New York (Tr. 2-5-96 pp. 1427-1466, 1472-1476), as well as participation in other substantial importations (Id. pp. 1504-1515). See also reference to transportation of 69 kilos of cocaine and of 20 kilos of cocaine (Tr. 1-24-96, p. 399; Tr. 1-25-96, p. 438).

[7] Transcript 2-14-96, pp. 2371-2382, 2384, 2386.

[8] Apprendi v. New Jersey, 530 U.S. 466 (2000).

guideline range of his conviction and same became final back in 1998 with denial of the *certiorari* filed before the Supreme Court subsequent to the direct appeal decision of February 5, 1998.[9] Furthermore, the arguments raised under Apprendi fail to present a challenge to the conviction nor to the question of guilt or innocence in this post-conviction motion.

Claim of use of highlighted portions of transcripts by the prosecution:

Petitioner's claim, that the witness was allowed to interpret and misconstrue the recorded conversations, fails to address the coded nature of the language used by the participants.[10] Counsel for petitioner argued that there was no specific drug talk in the tape recordings, except for the explanations provided by the government's witness that interpreted the coded talk as drug talk.[11] The jury would not have fully comprehended the nature of the conversation without the witness' explanations. The trial court discussed the issue and determined, without finding, there was no discrepancy pointed out between the transcripts and the recorded conversations nor of what was played in the monitors. Defendant was given an opportunity to play, in addition, any tape he wanted to present into evidence or all of them. Thus, a review of the record belies the petitioner's allegation that the jury was provided with

---

[9] As this Court has held on numerous occasions, "[n]o Apprendi violation occurs when the district court sentences a defendant below the default statutory maximum". United States v. Barnes, 244 F.3d 115, 119 (1st Cir. 2001). United States v. Campbell, slip op. No. 00-2493 (1st Cir. October 11, 2001), 2001 WL 1181100.

[10] Transcript 1-29-96, p. 907; Tri. 1-30-96, p. 1017; Tr. 1-31-96, p. 1060; Id. p. 1063; Tr. 1-30-96, p. 959; Id. p. 962; Tr. 2-1-96, pp. 1218-1223; Tr. 2-2-96, pp. 1258-1259, 1268.

[11] Transcript 2-14-01, p. 2419.

highlighted transcript and in fact defendant addressed the Court indicating the transcripts were exactly a copy of what was said on the tapes. As to redacted portion of three pages considered irrelevant to the matter being tried, the Court made then a ruling and defendant, who also had the tapes, could have played same to the jury as part of his defense strategy.[12]

Court Rulings:

Petitioner raises that the Court failed to allow him *pro-se* representation as he initially requested. The record shows defendant requested the Court for his participation in certain parts of the case but not for the resignation of his counsel. Prior to trial, at the Carbone hearing held after a trial date was already scheduled, defendant indicated he would not appreciate any further continuances to be granted. At that time, no mention of a request for *pro-se* representations was then made. To the contrary, defendant indicated Attorney Moskowitz would still represent him and he wanted that, if possible, legal representation be one between counsel and defendant, that is, so he would take part in his own defense.[13] The Court considered and discussed the defendant's petition at trial and indicated to defendant he not only lacked legal training but had also to protect the rights of other defendants in the case, who opposed the defendant's participation since he could prejudice their clients.[14] Still, the record does not show the defendant requested full *pro-se* representation nor made any petition to waive counsel, but rather to extend his participation. On the first day of trial, the record further shows that, if

---

[12] Transcript 2-9-96, pp. 1983-1989; Id. 1991.

[13] Transcript 12-7-95, pp. 4-7.

[14] Transcript 1-22-96, pp. 4-10; Tr. 2-23-96, pp. 4-11.

anything, defendant first considered he have had hybrid representation and complained about not meeting with his local, not his state counsel, and that because of the limitations imposed by his incarceration he was not personally able to help his attorney with the facts. It was on the same day of trial and after considering the Court had denied his petition to actively participate, with the opposition of other defendants, that defendant again indicated he would like to proceed *pro-se*, but still with the aid of counsel.

Other issues raised by petitioner:

Defendant has additionally raised ineffective assistance by appellate counsel. The government submitted an affidavit of Attorney Besser stating not having seen merit as to issues except for the ones ultimately raised on appeal, as it was his professional opinion, upon consultation with defendant. Notwithstanding, petitioner has raised those and numerous other issues through his subsequent motions for new trial and the appeal thereof, all found finally without merit.[15] The ineffectiveness of counsel on appeal claim should be subject to summary dismissal.

Evidence as to money laundering was objected by counsel and denied by the presiding court since the evidence of money laundering was related to the drug conspiracy charges.[16] A similar evidentiary ruling was made by the trial court as to the defendant not being a tax payer and that he owned cattle, which was also consequence of his defense as to sources of

---

[15] The Court of Appeals for the First Circuit had in addition a Petition for Rehearing and Permission to File Supplemental Brief presenting the issues of appellant not raised by his counsel which was subsequently denied. See Order of February 26, 1998, No. 96-2280.

[16] Transcript 1-25-96, p. 566; Tr. 2-1-96, pp. 1195-1196.

income and as relevant to the conspiracy.[17] Still, even an erroneous evidentiary ruling, which is not the above discussed, would require jury verdict to be vacated only if such ruling excluded evidence and the exclusion resulted in actual prejudice. On appeal, review would have been under abuse of discretion standards and petitioner has not presented grounds for ineffectiveness of counsel for not presenting those issues to the Court of Appeals.

As to those issues previously raised by petitioner's through his direct appeal and/or the motions for new trial, these need not be reviewed again by way of a motion for post-conviction relief.[18] Dirring v. United States, 370 F.2d 862, 864 (1st Cir. 1967) cited in Barrett v. United States, 965 F.2d 1184, 1190 n.11 (1st Cir. 1992). See also Singleton v. United States, 26 F.3d 233 (1st Cir. 1994).

In light of the above discussed, this magistrate is of the opinion and recommends that the plethora of claims raised in petitioner's motions for post-conviction relief requested BE DENIED.

IT IS SO RECOMMENDED.

The parties have ten (10) days to file any objections to this report and recommendation. Failure to file same within the specified time waives the right to appeal this order. Henley Drilling Co. v. McGee, 36 F.3d 143, 150-151 (1st Cir. 1994); United States v. Valencia, 792 F.2d 4 (1st Cir. 1986).

---

[17] Transcript 2-9-96, pp. 2010-2011.

[18] United States v. Manuel Gonzalez-Gonzalez, slip op. No. 00-2014, (1st Cir. July 19, 2001); United States v. Gonzalez-Gonzalez, 106 F.Supp.2d 269 (1st Cir. 2000); United States v. Gonzalez-Gonzalez, 136 F.3d 6 (1st Cir. 1998). See also Manuel Gonzalez Gonzalez v. United States, slip op. No. 00-1564 (1st Cir. July 23, 2001).

In San Juan, Puerto Rico, this 30th day of October, 2001.

J. ANTONIO CASTELLANOS
UNITED STATES MAGISTRATE JUDGE